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No. 616

In the Supreme Court of the United States

OCTOBER TERM, 1940

THE UNITED STATES OF AMERICA, APPELLANT

v.

LEAMON RESLER, AND LEAMON RESLER DOING BUSINESS AS RESLER TRUCK LINE AND AS BRADY TRUCK LINE.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO

BRIEF OF THE RESPONDENT

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STATEMENT

The statement contained in the brief filed for the United States satisfactorily sets forth the facts in this matter, so we see no need of making a further statement other than to add that when the application by the respondent to purchase the rights of C. J. Brady, referred to in the brief for the United States, was dismissed on the respondent's request, such request was due to the fact that respondent had sold the certificate to a third party, to whom it was later transferred.

ARGUMENT

We agree with all statements made in appellant's brief as to the purpose of the Motor Carrier Act in

initiating a complete system of regulation by the Interstate Commerce Commission over the contract and common motor carriers in this country. We do disagree with appellant's interpretation of Sections 212 and 213 of the Motor Carrier Act of 1935. Appellant contends that the exemption found in the statute, which is set forth on page 10 of its brief, applies only to the procedure required in Section 213, and is separate and apart from the procedure required by Section 212. An analysis of these two sections will show the contrary. Section 212 (b) provides,

> "Except as provided in Section 213, any certificate or permit may be transferred pursuant to such rules and regulations as the Commission may prescribe".

Appellant contends that the above quoted language gives the Interstate Commerce Commission authority to require its approval before a transfer may be effected, where twenty (20) or fewer vehicles are involved. The power to approve a transfer necessarily carries with it the power to disapprove such a transfer, and wherein, in the language quoted, can be found any authority to disapprove a proposed transfer? No grounds are set forth upon which the Commission might base a disapproval. Such is not true as to Section 213, which section expressly provides that the Commission may approve a transfer, merger or acquisition of control only upon a finding that the transaction will be consistent with the public interest, and in the case of acquisition by a rail carrier upon a further finding that the transaction will be to public advantage in the rail operation and will not unduly restrain competition. But in Section 212 there is no basis established for disapproval of any proposed transfer, the

Commission merely being given the right to prescribe rules and regulations.

It is true that the Commission has issued the rule set forth in appellant's brief, found on pages 24 to 30 of appellant's brief, purporting to require the approval of the Commission before completion of a proposed transfer where twenty (20) or fewer vehicles are involved, but the Commission cannot issue a rule without authority of Congress, and if the Commission has no authority under the Motor Carrier Act to disapprove a transfer of a permit or a certificate where twenty (20) or fewer vehicles are involved, then of what purpose is a rule requiring its approval?

Appellant contends that the affirming of the lower Court's opinion would leave a great gap in the power of the Interstate Commerce Commission to regulate the motor carriers; that they would not even know who were the owners of the certificates. Such argument is specious, for the reason that the Commission is given full power to issue rules and regulations covering transfers where not more than twenty (20) vehicles are involved, and has the power thereunder to require notice to the Commission of the name, address, financial responsibility and other data concerning the purchaser, and has the power to require such purchaser to comply with all the rules and regulations concerning the filing of tariffs, carrying of insurance for the protection of the public and of the shippers, and any other rules and regulations affecting operations under the jurisdiction of the Interstate Commerce Commission.

The counsel for appellant has gone dehors the record on page 17 of their brief, to cite the number of motor

vehicle carriers operating less than ten (10) vehicles. This is all the more reason why the lower Court's opinion should be affirmed. If all of these carriers be required to go before the Interstate Commerce Commission, secure that tribunal's authority before effecting a transfer of an operation using one unit which involves a multitude of useless procedure, it is exactly the type which Congress sought to avoid by inserting the amendment to Section 213 mentioned in the foot-note on page 12 of appellant's brief, wherein Senator Wheeler, Chairman of the Senate Committee, after discussing the control given to the Interstate Commerce Commission, makes this statement, and we quote from the foot-note contained in appellant's brief:

> "***** An amendment made by the committee makes this jurisdiction applicable, except in the case of rail, express, or water carrier affiliations, only where the total number of vehicles involved is more than 20.
>
> In other words, we eliminated from this provision such a case, for example, as that of two small operators who might want to get together and we made it apply only to cases where they had more than 20 vehicles, so that the small operators could get together without the necessity of going through a great deal of red tape with the Commission."

Obviously, Senator Wheeler felt that the amendment to Section 213 exempting carriers operating twenty (20) or fewer vehicles did not only exempt such carriers from following the procedure outlined in Section 213, but also exempted such carriers from the necessity of securing any approval from the Interstate Commerce Commission, and we believe this intent is clearly expressed by the language of the Act. As stated by

appellant, this is a matter of first impression in the Courts, and strange to say the Interstate Commerce Commission itself has not directly passed upon this question, except negatively.

We wish to cite two decisions of the Interstate Commerce Commission, which we believe will clearly show that the Commission itself believes its power to approve exists only when more than twenty (20) vehicles are involved: In the matter of *P. & F. Motor Express, Inc.—Purchase—Henry H. Hunt et al.; No. MC-F-801, 1 Federal Carriers Cases, Page 339, Paragraph 7371*, this case came up on the question as to how many vehicles were involved. Division 5 of the Commission found that semi-trailers and tractors should be considered as separate units, thereby, in that case, involving more than twenty (20) vehicles. The majority opinion merely makes the decision above noted. Commissioner Lee concurring, states as follows:

> "Applicant is permitted by this decision to purchase the rights and property of the Hunts. This result is satisfactory, but, in my opinion, our approval is not necessary. In such a case, section 213 (e) of the Motor Carrier Act provides that our authority to consummate a purchase is not necessary 'where the total number of motor vehicles involved is not more than 20'. * * * * In my opinion, we should hold that applicant's eight tractors and eight trailers constitute eight motor vehicles, and that the Hunts' three tractors and three trailers count as three motor vehicles; and that these added to the seven trucks (five owned by applicant and two owned by the Hunts) make 18 motor vehicles. Counting a tractor and trailer combination as two vehicles extends our jurisdiction over pur-

chases which otherwise would not require our approval."

In *H. & K. Motor Transportation, Incorporated—Purchase—Roy H. Burry; No. MC-F-993, 1 Federal Carriers Cases, Page* 513, *Paragraph* 7463, the Commission stated as follows:

> "In approving the acquisition of the motor carrier rights of Tolan S. Miller by applicant, the Commission said: 'The instant transaction was consummated by applicant without our prior authority under section 213, under the mistaken belief that, as applicant then owned and operated only 17 motor vehicles and purchased only two vehicles from Miller, the transaction was exempt under Section 213 (e). However, as applicant, at the time in question, was controlled in a common interest with two other motor carriers (Brown and Huber Motor) the aggregate of whose vehicles exceeded 20, such consummation in advance of our approval was unlawful".

Thus, we see by negative expression, the Commission itself seems of the opinion that the consummation of a transfer without Commission approval is unlawful only where more than twenty (20) vehicles are involved. In this case, respondent, on April 14, 1939, filed an application with the Commission to purchase Brady. On October 17, 1939, no action had as yet been taken by the Commission on the application, at which time the application was dismissed. It was to avoid exactly such situations as happened in this case on sales between small carriers, that the exemption contained in Section 213 was inserted by amendment, and is why Senator Wheeler made the statements above referred to. Small carriers such as those, in many cases, would

be completely out of business and their rights extinguished by abandonment, as they might often have to wait six months and no telling how much longer for the Commission to go through its slow procedure of granting an approval, the necessity of which is not even established by statute.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

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HARRY S. SILVERSTEIN
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES.

No. 616.—October Term, 1940.

The United States of America, Appellant, *vs.* Leamon Resler, etc., Appellee.	On Appeal from the United States District Court for the District of Colorado.

[April 14, 1941.]

Mr. Justice Murphy delivered the opinion of the Court.

This appeal presents two important questions affecting the administration of the Motor Carrier Act of 1935 (49 Stat. 543). The first is whether § 213(e) places beyond reach of § 212(b) transfers of operating rights where not more than twenty vehicles are involved. The second is whether the Interstate Commerce Commission possessed statutory authority to rule that assent of the Commission is a condition precedent to an effective transfer which is subject to § 212(b).

In July, 1940, the United States filed an information against appellee charging that he had engaged in interstate motor carrier operations over a specified route in Colorado without a certificate of public convenience and necessity required by § 206(a) of the Motor Carrier Act of 1935. Appellee filed a special plea in bar alleging in substance that he had not violated § 206(a) because he had acquired the requisite certificate from one Brady to whom it had been issued originally, and that the approval of the Interstate Commerce Commission was not necessary to validate that transfer. The District Court sustained this plea, and the United States appealed directly to this court. 34 Stat. 1246, 18 U. S. C. § 682. Counsel for appellant and appellee have stipulated that not more than twenty vehicles were involved in the transfer from Brady to appellee, and that the Interstate Commerce Commission has not approved that transfer.

The transfer is governed by § 212(b). That section provides: "Except as provided in section 213, any certificate or permit may be transferred pursuant to such rules and regulations as the [Inter-

state Commerce] Commission may prescribe." Section 213, regulating consolidations, mergers, and other acquisitions of control of motor carriers, provides in subsection (e) that " . . . the provisions of this section requiring authority from the Commission for consolidation, merger, purchase, lease, operating contract, or acquisition of control shall not apply where the total number of motor vehicles involved is not more than twenty."

The obvious sense of § 212(b) could hardly be expressed more aptly than in the language quoted. Section 213(e) is equally explicit. Read together, the two sections can mean only that a transfer involving not more than twenty vehicles is governed by § 212(b) and the regulations enacted pursuant to it. The phrase "Except as provided in § 213" was intended to remove from the sweep of § 212(b) only those transfers which were within the compass of § 213. It was never intended to place beyond reach of § 212(b) the transfers which § 213(e) expressly placed beyond reach of § 213.

Notwithstanding the fact that the instant transfer is subject to § 212(b), appellee challenges the Commission's authority to enact Rule 1(d) which provides: "No attempted transfer of any operating right shall be effective except upon full compliance with these rules and regulations and until after the Interstate Commerce Commission has approved such transfer as herein provided. . . ." Order of July 1, 1938, 3 Fed. Reg. 2157.

Power to make rules regulating the transfers embraced in § 212(b) derives from the phrase in that section "pursuant to such rules and regulations as the Commission may prescribe", and from § 204(a)(6) which makes it the duty of the Commission to "administer, execute, and enforce all provisions of [the Motor Carrier Act], to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration. . . ." Undoubtedly the power to prescribe regulations is not unlimited, but neither section provides or implies that the Commission is without authority to rule that parties to a proposed transfer which is governed by § 212(b) must first obtain the consent of the Commission. Indeed, the conclusion is inescapable that such a rule is clearly within the regulatory power which Congress intended to confer on the Commission; for Congress could insure effective enforcement of other sections of the Act only by granting

the Commission power to enact regulations broad enough to authorize Rule 1(d).

Sections 213(a) and 213(b) carefully provide in detail for the regulation of transfers of operating rights by merger, consolidation, or by other specified means. Section 213(a)(1) expressly stipulates that the approval of the Commission must precede a transfer which is subject to § 213. Manifestly, the administration of §§ 213(a) and 213(b) would be seriously hampered if the Commission were powerless to make the same requirement with respect to transfers subject to § 212(b), particularly since the number of vehicles involved may determine which section is applicable.

In many respects a transferee such as appellee stands in the same relation to the Commission as an original applicant for permission to operate. Many inquiries which are relevant to the initial application are equally relevant to the proposed transfer. Section 206(a), with immaterial exceptions, permits common carriers by motor vehicles to operate only if the carrier has first obtained a certificate of public convenience and necessity. Section 207(a) expressly conditions issuance of the certificate on findings by the Commission that the applicant is "fit, willing, and able properly to perform the service proposed and to conform to the provisions of [the Motor Carrier Act] and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity." Plainly the finding of the requisite fitness, willingness, and ability of the first applicant is wholly inapplicable to his proposed transferee (see Rule 2(c), 3 Fed. Reg. 2158), and the operations inceptively authorized no longer may serve public convenience and necessity because conditions have changed. See Rule 6, 3 Fed. Reg. 2158; compare §§ 208(a), 212(a). It is evident that full enforcement of §§ 206(a) and 207(a) likewise would be impeded if the Commission lacked power to rule that its consent must precede a transfer subject to § 212(b).[1]

[1] Absent such power, the Commission would encounter similar difficulties in the administration of other sections. Section 215 requires the Commission to withhold a certificate until the carrier has complied with Commission regulations exacting security for damage to persons and property. Section 217 compels specified carriers to file tariff schedules. Section 221 obligates motor carriers to file written designations of agents for service of process and Commission orders.

See also §§ 220, 223.

We conclude that the Commission acted within its authority to prescribe rules and regulations to implement § 212(b) in ruling that its consent was a condition precedent to an effective transfer governed by that section. It was not compelled to contest the legality or propriety of such a transfer after it had been completed.

The judgment of the District Court is reversed and the cause is remanded for further proceedings.

A true copy.

Test:

Clerk, Supreme Court, U. S.